Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Court of Appeals err in holding that the petitioner was not protected by the qualified First Amendment privilege enjoyed by journalists?

II.

Was the Court of Appeals' determination that the contemnor had not made an adequate showing to invoke her Fifth Amendment privilege in conflict with the relevant decisions of this Court?

LIST OF ALL PARTIES

1. Vanessa Leggett, Defendant-Petitioner.
2. The United States of America, Plaintiff-Respondent.

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U.S. Supreme Court Rule 12 1

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, Vanessa Leggett, through the undersigned counsel, and pursuant to Rule 12, files this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

On August 17, 2001, the Court of Appeals for the Fifth Circuit affirmed, in an unpublished opinion, the District Court's order of July 20, 2001 that held Ms. Leggett in civil contempt. A petition for rehearing *en banc* was denied on November 13, 2001. All of the opinions are appended to this petition.

BASIS FOR JURISDICTION

1. The final opinion of the Court of Appeals for the Fifth Circuit was delivered on November 13, 2001. The three judge panel opinion for the Fifth Circuit was filed on August 17, 2001.

2. Petitioner asks this Court to review the final judgment of the Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

4. This petition is timely if filed on or before February 11, 2002.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On July 19, 2001 petitioner Vanessa Leggett, a free-lance journalist, was held in civil contempt under 28 U.S.C. § 1826 by a judge of the United States District Court for the Southern District of Texas after Ms. Leggett refused to reveal her confidential source information in response to a grand jury subpoena (Tran. II-46).[1] Ms. Leggett is a reporter and author[2] who has conducted four years of tape-recorded interviews in six states as part of her research for a book on the "Robert Angleton murder case" in Houston, Texas. Mr. Angleton was tried and acquitted of capital murder in a Texas state court in August, 1998. After his acquittal, the U.S. Attorney's office for the Southern District of Texas instituted an investigation of him for federal charges.

The federal prosecutors began their efforts to seek information from Ms. Leggett in July, 2000 (Tran. I-23). Knowing she was writing a book, FBI agents, in November, 2000, tried to recruit Ms. Leggett as a secret investigator by offering her a confidential informant contract,

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[1] The record is designated herein as follows: "Rec. Exc." is the Record Excerpts volume, prepared for the Court of Appeals, containing germane court documents. "Tran. I" and "Tran II" refer to transcripts from district court hearings on July 6, 2001 and July 19, 2001 respectively.

[2] Ms. Leggett has previously received media credentials from *Texas Monthly* and the *Houston Press*. She has also been published in the FBI's book *The Varieties of Homicide and its Research*, in the short story anthology *Suddenly* and by *Newsweek*. Ms. Leggett has also won first place for her writings from the Fort Bend Writers Guild and the Santa Barbara Writers Conference.

which included oral promises of financial gain, but also required her to notify the FBI before disseminating or publishing her book or any of her materials. She declined their proposal. She believed that working for the government as a secret informant would impair her ability to research and write as an independent investigative reporter, and she did not want the government restricting the dissemination of her book (Tran. I-26-27). Immediately upon receiving her refusal, the FBI agents served Ms. Leggett with a grand jury subpoena, requiring her appearance a month later. Ms. Leggett complied with that subpoena, relying on the FBI's promise that she would not be asked to reveal her confidential source information (Tran. I-24-25).[3] That promise was honored on December 7, 2000, when she testified (Tran. I-24).

In June, 2001, the government served Ms. Leggett with a new grand jury subpoena that compelled production and surrender of the following items:

> "**Any and all** tape recorded conversations, **originals and copies**, of conversations you had with the following individuals, [34 people listed] or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, **and all transcripts** prepared from those tape recordings:" [Emphasis added.]

Ms. Leggett filed a motion to quash the subpoena. On July 6, 2001, the District Court denied the motion. The

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[3] Ms. Leggett testified during the Motion to Quash that a number of her sources demanded confidentiality (in some instances in writing) because they were afraid of retaliation by Angleton.

judge ruled that there is *no* qualified privilege for journalists to protect either confidential or nonconfidential sources in criminal cases in the Fifth Circuit, citing *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), as well as this Court's seminal decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Ms. Leggett filed a *pro se* Motion to Reconsider on July 16, 2001. In that motion, Ms. Leggett pointed out that a demand for her to turn over all originals and copies of recordings, as well as transcripts of those recordings, would deprive her of the resources she needed to continue her journalistic work. The government never filed a response to this motion.

An identical subpoena was again served on Ms. Leggett on July 18, 2001, directing her to appear before the grand jury the next morning. On the present record, it is not clear why the prosecutors did not show a compliance with their own internal Department of Justice procedures which is required to precede issuance of a subpoena to a journalist.[4] Ms. Leggett appeared as directed, but she invoked the journalist's qualified privilege under U.S. CONST. amend. I and the privilege against self-incrimination under U.S. CONST. amend. V. In recognition of Ms. Leggett's Fifth Amendment claim of privilege, the Assistant U.S. Attorney produced an "informal letter" for use immunity[5] (Tran. II-3).

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[4] Under 28 C.F.R. § 50.10, the Justice Department is to conduct an in-house review, balancing its investigative needs with the journalist's interests, and then obtain the approval of the U.S. Attorney General before obtaining the subpoena.

[5] Ms. Leggett had testified during the Motion to Quash hearing that she had tape recorded some interviewees without their knowledge. (Tran. I-28 and 34). The prosecution later

The district judge ordered Ms. Leggett to comply with a particular line of questioning about recordings. When Ms. Leggett continued to invoke her constitutional privileges, the district court held Ms. Leggett in contempt (Tran. II-50-54). In the course of the hearing, the judge did not receive evidence or articulate findings with respect to any balancing of the interests involved in the First Amendment question. The district court also did not enter findings as to whether the informal offer of partial use immunity was sufficient to protect the Fifth Amendment privilege.[6] The district court went on to deny Ms. Leggett's previously filed *pro se* Motion to Reconsider without argument (Tran. II-10). The court ordered Ms. Leggett to be incarcerated the next day (Tran. II-54, 63). At the time of this filing, Ms. Leggett has been held in custody for over 160 days, which is more than three times as long as any other reporter in United States history.[7]

An expedited appeal was ordered, but Ms. Leggett's motions for stay or bond pending appeal were denied both by the District Court and the Court of Appeals. On

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acknowledged in the contempt hearing that there are at least "5-6 states" in which non-consensual recordings might result in criminal charges. (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may be a violation of federal law under 18 U.S.C. § 2512.

[6] The prosecutor acknowledged that his informal immunity letter was not the same as statutory immunity pursuant to 18 U.S.C. §§ 6001, *et seq.*, but mistakenly thought the difference was that the letter did not offer transactional immunity.

[7] The Reporter's Committee for a Free Press has compiled a list of known contempt sanctions against American journalists and publishes them on their web site: www.rcfp.org.

August 17th, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's order. *See* Appendix. Ms. Leggett timely sought *en banc* reconsideration, which was denied on November 13, 2001.

REASONS FOR REVIEW

I.

Did the Court of Appeals err in holding that the petitioner was not protected by the qualified First Amendment privilege for journalists?

For almost thirty years, lower courts have struggled to interpret and apply the First Amendment qualified privilege articulated by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The result has been an unequal implementation of the privilege across the United States with news gatherers receiving disparate treatment depending on which Court of Appeals they appear before. The issue has become one of national importance and the time is ripe for this Court to provide clarification.

In *Branzburg*, this Court recognized that journalists enjoy some degree of constitutional privilege against disclosure of confidential source information. 408 U.S. at 709. Although this Court found in *Branzburg* that the governmental interest in a grand jury's investigative function outweighed the privilege on the facts of those cases,[8] this Court's recognition of the underlying privilege has remained the case's most important aspect. An

[8] *Branzburg* involved three consolidated cases.

amicus brief submitted by interested journalistic organizations to the Court of Appeals collated almost three dozen state and federal cases recognizing some degree of privilege in the wake of *Branzburg*.[9] Yet as the *amici* journalistic organizations observed in their brief, "it cannot be said that a consensus has been reached."

A widely accepted interpretation of *Branzburg*, based in part on Justice Powell's concurring opinion, is that the qualified privilege for news gatherers under the First Amendment means there is a balancing test that should be conducted on a case-by-case basis. Justice Powell's concurring opinion in *Branzburg* stated:

> The asserted claim of privilege [by a journalist] should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant

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[9] The *amicus* brief was filed by The Reporter's Committee for Freedom of the Press, The American Society of Newspaper Editors, The Radio-Television News Directors Association, and The Society of Professional Journalists. The following organizations also moved to join the *amicus* brief but their motion, which was untimely, was denied: ABC, Inc., The American Society of Journalists and Authors, The Associated Press, Belo Corp., Cable News Network LP, California First Amendment Coalition, CBS News, The Copley Press, Dow Jones & Company, Inc., The Freedom of Information Foundation of Texas, Investigative Reporters and Editors, Inc.. Louisiana Press Association, Mississippi Center for Freedom of Information, Mississippi Press Association, National Broadcasting Company, Inc., National Writers Union, The New York Times Company, Student Press Law Center, Texas Association of Broadcasters, Texas Daily Newspaper Association, Washington Independent Writers, Washington Independent Writers Legal and Education Fund and The Washington Post Company.

> testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

408 U.S. at 710 (Powell, J., concurring).

The Fifth Circuit has impeded application of such a case-by-case balancing test, as is illustrated by the decision in *United States v. Smith,* 135 F.3d 963 (5th Cir. 1998) and now by the decision in the present case, by finding that there is no qualified privilege afforded to journalists in criminal cases. Relying primarily on *Smith,* the Court of Appeals held in this cause that the journalist's privilege is "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." Slip opin., p. 6. The Court affirmed the lower court's failure to conduct any balancing of the interests and its application of a more narrow "intentional harassment" standard to Ms. Leggett's claim of privilege. The Fifth Circuit's interpretation of *Branzburg* diminishes the importance of the qualified First Amendment privilege to no more than a weakened version of a procedural rule (i.e., Fed. R. Crim. P. 17(c)[10]) and ignores *Branzburg's* edict that newspersons enjoy an actual form of constitutional privilege. This Court should grant a writ in this case in order to clarify these issues.

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[10] Fed. R. Crim. P. 17(c) states in relevant part: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

A.

Do journalists have a qualified First Amendment privilege in criminal cases that require a court to conduct a balancing of interests on a case-by-case basis?

In the shadow of *Branzburg*, federal circuit courts have generally recognized a "qualified privilege" for journalists to resist disclosure of sources' identities and source materials. Courts have repeatedly acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information can have on the gathering and reporting of news. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Society's interest in protecting the integrity of the news gathering process, and in insuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.' " (internal cites ommitted)). What the courts are ultimately protecting, when acknowledging a journalist's qualified privilege, is the public's "right to know".

The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. Circuits have all interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[11] Moreover, eight federal circuits have held that the

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[11] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno & Sullivan, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d

qualified privilege applies to journalists faced with a subpoena seeking discovery of confidential sources or, where the subpoenaing party has not met its burden, for unpublished information.[12]

This Court has stated that news gathering activities are entitled to protection under the First Amendment because without it, "[the] freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. Justice Powell's concurrence in *Branzburg* arguably provides the lower courts with the means of protecting that concern – by conducting a balancing of the countervailing interests on a case-by-case basis. What remains in question amongst the circuits is to what degree should the balancing of interests occur based on the "type" of case before the court.

For example, in the Fifth Circuit, the Court acknowledges an expansive balancing of interests test when faced with a journalist's qualified First Amendment privilege in certain civil cases. In those cases, it uses a three prong test to weigh whether discovery of the requested information is appropriate by assessing if:

1134 (4th Cir. 1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

[12] *See Clyburn v. New World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *United States v. LaRouche Campaign, supra; LaRouche v. National Broadcasting Co., supra; United States v. Burke, supra; United States v. Cuthbertson, supra; Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (1980); *Shoen v. Shoen, supra; Silkwood v. Kerr-McGee Corp, supra.*

1) the information is relevant;

2) the information can be obtained by alternative means; and

3) if there is a compelling interest in the information.

Miller v. Transamerican Press, Inc., supra at 726. Nevertheless, the Fifth Circuit refuses to broaden its application of its three part balancing test to criminal cases, while other circuits do not. As will be demonstrated in more detail below, there is a great division amongst the circuits as to how the news gatherer's qualified First Amendment privilege is applied in criminal cases; thus, favoring the grant of certiorari. Sup. Ct. R. 10.

B.

Has the Court of Appeals in the Fifth Circuit entered a decision regarding application of a journalist's qualified First Amendment Privilege that is in conflict with the decisions of other United States Court of Appeals on the same matter?[13]

The circuits are in dispute whether the First Amendment necessitates a qualified privilege in criminal cases.

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[13] Although this case deals with a subpoena in a grand jury setting, it is very likely that Ms. Leggett will be resubpoenaed for the same information in the actual criminal trial. The Fifth Circuit's test applying only harassment or oppression remains the same in both instances and its conflict with other circuits does not change. If the grand jury ends with Ms. Leggett remaining steadfast in her assertion of her privileges, this court is nonetheless urged to accept this writ, in order to prevent these issues, which are very capable of repetition, from escaping review in this case.

A circuit-by-circuit analysis is provided below to exemplify the apparent conflict.

DISTRICT OF COLUMBIA CIRCUIT

The Court of Appeals has held, citing *Branzburg*, that a "good faith" criminal investigation overrides a journalist's interest in protecting sources in all criminal settings including a grand jury, although the court suggests a different standard might apply to a "bad faith" investigation. *Reporter's Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). – *But see United States v. Hubbard*, 493 F.Supp. 202 (D.D.C. 1979) (Reporters protected under First Amendment and *Branzburg* from a subpoena in a criminal case, unless showing made that information is necessary for a fair hearing and not available from other sources); *In re Grand Jury 95-1*, 27 Med. L.Rptr. 1833 (D.D.C. Dec. 27, 1996) (Media has no First Amendment privilege under *Branzburg* to withhold documents sought by grand jury, and even if privilege were to apply, it has been overcome by a showing that materials are relevant, alternative sources had been exhausted and compliance with 18 C.F.R. § 50.10 – the Department of Justice's internal regulations regarding subpoenaing news gatherers).

FIRST CIRCUIT

The Court of Appeals has held that when a newsman asserts a qualified First Amendment privilege in response to a defendant's subpoena for non-confidential materials

in a criminal case, the lower court must conduct a balancing of the applicable constitutional interests. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). The lower court shall weigh a defendant's right to a fair trial – that is, a right to compulsory process and confrontation of adverse witnesses – against the First Amendment concerns of the news media as part of its *in camera* inspection of the subpoenaed materials. *Id.* The lower court is expected to limit the disclosure of journalistic products to those cases where their use would be of significant utility to a criminal defendant. *Id.* at 1183.

SECOND CIRCUIT

The Court of Appeals has held that the standard of review for a journalist's qualified First Amendment privilege should remain the same in both civil and criminal cases. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). The Court applied a three part test in *Burke*, a criminal case, in order to balance the competing constitutional interests on a case-by-case basis. *Id.* The Court ordered that a journalist's subpoenaed materials could be disclosed only where there has been a clear and specific showing that the material sought is: 1) highly material and relevant; 2) necessary or critical to the maintenance of the claim by the party; and 3) not obtainable from other available sources. *Id.* Such a balancing of interests under the First Amendment should even occur where a reporter is asked to testify before a grand jury. *Baker v. F & F Investment*, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (citing *Branzburg*). Yet, when a reporter is an actual witness to the crime itself, such as was the case in *Branzburg*, First

Amendment concerns are outweighed by a subpoenaing defendant's need for the information. *United States v. Cutler,* 6 F.3d 67 (2d Cir. 1993) (Limiting *Burke* to its facts, the court lowered the level of "need" that must be shown to overcome the privilege when the materials at issue were sought by a criminal defendant). *See also Gonzales v. National Broadcasting Co.,* 194 F.3d 29 (2d Cir. 1999).

THIRD CIRCUIT

The Court of Appeals has found that a newsperson's First Amendment qualified privilege applies in criminal cases and protects a journalist from divulging confidential information and unpublished materials. *United States v. Cuthbertson,* 630 F.2d 139, 146-147 (3d Cir. 1980) ("Cuthbertson I"), *cert. denied,* 449 U.S. 1126 (1981). The lower court must balance a subpoenaing defendant's need for the information against the interests underlying the First Amendment privilege in order to determine whether the newsman's privilege will yield in a particular case. *Id.* at 148. The lower court should not require the disclosure of a journalist's information for an *in camera* review unless it is first shown that a defendant's subpoena complies with Fed. R. Crim. P. 17(c) and he is unable to acquire the information from another source that does not enjoy such a privilege. *Id. See also United States v. Cuthbertson,* 651 F.2d 189 (3d Cir.), *cert. denied,* 454 U.S. 1056 (1981) ("Cuthbertson II").

When no countervailing constitutional concerns are at stake, a journalist's First Amendment privilege is absolute; when constitutional prece[illegible]s collide, the privilege

becomes qualified and a balancing process comes into play to determine its limits. *United States v. Criden,* 633 F.2d 346, 356 (3d Cir. 1980). Before a reporter can be compelled to disclose a confidential source in a criminal case, the movant must demonstrate that he has made an effort to obtain the information from other sources, must demonstrate that the only access to the information sought is through the journalist and the journalist's sources and must persuade the court that the information sought is crucial to the claim. *Id.* In grand jury situations, the government must over come a three part test by demonstrating: 1) it has attempted to obtain the information from other sources, 2) the only access to the information sought is through the journalist and his/her sources, and 3) the information sought is crucial to the cause at issue. *In re Williams,* 766 F.Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court,* 963 F.2d 567 (3d Cir. 1992) (*en banc*).

FOURTH CIRCUIT

The Court of Appeals, citing *Branzburg* and emphasizing the nonconfidentiality of the information sought, held that absent evidence of government harassment or bad faith, reporters have no privilege under the First Amendment that is different from any other citizen that would allow them not to testify about knowledge relevant to a criminal prosecution. *In re Shain,* 978 F.2d 850 (4th Cir. 1992).

FIFTH CIRCUIT

The Court of Appeals has held, under *Branzburg*, that there is no qualified journalist's First Amendment privilege and no balancing of the interests under the First Amendment in regards to subpoenaed confidential and nonconfidential information in criminal cases. *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Subpoenas (Leggett)*, Slip. opin. 01-20745 (Nov. 13, 2001). The Court will only protect a reporter from government harassment or oppression. *Id.* In Ms. Leggett's case, the Court upheld the lower court's more narrow application of an "intentional harassment" standard to Ms. Leggett's claim of privilege.

SIXTH CIRCUIT

The Court of Appeals has held, citing *Branzburg* and rejecting any effect resulting from Justice Powell's opinion, that newsmen have no greater rights under the First Amendment than any other witnesses when appearing before a grand jury. The Court also determined that the proper test to be applied is whether a reporter is being harassed to disrupt his relationship with his confidential source, whether the information bears more than a remote and tenuous relationship to the subject of the investigation, and whether the forced disclosure of the confidential source relationship will serve a legitimate law enforcement need. *Storer Communications, Inc. v. Giovan*, 810 F.2d 580 (6th Cir. 1987).

SEVENTH CIRCUIT

The Court of Appeals has not squarely addressed a journalist's qualified First Amendment privilege in criminal cases, but in 1996, it found that a lower court had not abused its discretion when it quashed, under the First Amendment and an Illinois shield law, a criminal defendant's subpoena requesting a reporter's confidential information. *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995), *cert. denied*, 517 U.S. 1250 (1996). In making its finding, the Court recognized that the substance of the information sought by the defendant was merely speculative and was only going to be offered for impeachment purposes. *Id.*

EIGHTH CIRCUIT

The Court of Appeals has not squarely addressed whether journalist's enjoy a qualified First Amendment privilege in criminal cases, although it footnoted to *Branzburg* in a civil libel case for the proposition that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. *Cervantes v. Time, Inc.*, 464 F.2d 986, 992, n. 9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

NINTH CIRCUIT

The Court of Appeal's first case after the *Branzburg* decision upheld a journalist's claim of a qualified First Amendment privilege where a grand jury investigation failed to establish a "substantial connection" between the

information sought and the conduct being investigated. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). The Court later held that a balancing of conflicting interests was appropriate in a non-grand jury criminal case where a reporter's First Amendment qualified privilege was being weighed against a defendant's guarantee of due process in an on-going trial. *Farr v. Pitchess*, 522 F.2d 464, 466-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The Court in subsequent cases has also held that where a grand jury's requests for information from a reporter were posed in good faith and with a legitimate need for law enforcement purposes – a journalist has no First Amendment qualified privilege. *In re Lewis*, 501 F.2d 418 (9th Cir. 1974) ("Lewis I"), *cert. denied*, 420 U.S. 913 (1975) and *In re Lewis*, 517 F.2d 236 (9th Cir. 1975) ("Lewis II"). In both *Lewis* cases, the court also noted that the Justice Department had complied with its own regulations regarding subpoenas to the media. *See also In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (Ph.D. student's claim of a "scholar's privilege", as akin to a journalist's First Amendment qualified privilege, was not applicable before a federal grand jury as invoking Justice Powell's balancing test, where the individual had not argued that the grand jury's inquiry was not conducted in good faith, did not involve a legitimate need of law enforcement, or had only a remote and tenuous relationship to the subject of the investigation).

TENTH CIRCUIT

The Court of Appeals has not yet addressed a reporter's qualified First Amendment privilege in criminal cases.

ELEVENTH CIRCUIT

The Court of Appeals has held that in a criminal case, the standard governing a reporter's First Amendment privilege applies only to information obtained while news gathering and may only be compelled if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case and unavailable from other sources. *United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied,* 483 U.S. 1021 (1987). The privilege applies equally to both confidential and nonconfidential information. *United States v. Blanton,* 534 F.Supp. 295 (S.D.Fla. 1982), *aff'd,* 730 F.2d 1425 (11th Cir. 1984).

In Sum

The division among the circuits is no more clear than what occurred in Ms. Leggett's case. Here, the Court of Appeals recognized the conflict amongst the circuits (and its own disparate application of the privilege in civil and criminal cases) but choose to take "a narrow view" of the privilege in the criminal sector. Thus in the Fifth Circuit there is no inertia to the government utilizing the press as its investigative arm. It may do so at the whim of the local assistant U.S. Attorney without a requirement that

the public's First Amendment right to a free and independent press be considered. Citizens in other areas of our country enjoy a more protected First Amendment freedom. The diverging views within the individual Court of Appeals has undoubtedly given underlying district courts and state courts little guidance in their own application of the privilege. Whether the privilege should be "broad", such as in the Second or Third Circuits, or whether it should be replaced by the limited criteria imposed by the Fifth Circuit is a key question[14] that should be addressed and given clarification by this Court.

C.

Is *Branzburg* limited merely to protecting against harassment and oppression of newsmen without a balancing of the interests?

While *Smith* stated that "Justice Powell had in mind the 'harassment of newsmen' ", no doubt Justice Powell, and every other justice of this Court, would condemn outright harassment of the press. But by limiting the analysis of *Branzburg* to only the harassment or oppression of the individual newsman himself – the court is drawn away from the ultimate right that requires protection – the public's right to know.

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[14] Although *Branzburg* was cited as authority in *Smith*, no petition for writ of certiorari was filed in *Smith*, and it remains to be seen whether *Smith* applied *Branzburg* correctly.

Clearly, this Court in *Branzburg* recognized that the First Amendment guarantees protection to news gatherers beyond those of a procedural nature, as was evidenced when this Court stated: "[t]he Court does not hold that newsmen, subpoenaed to testify before the grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709. Yet, to accept the Fifth Circuit's narrow view of the privilege in Ms. Leggett's case (intentional harassment) would provide fewer rights to a journalist than those already provided to all subpoenaed criminal witnesses under Federal Rule of Criminal Procedure 17(c), which protects against unreasonable or oppressive subpoenas.[15] It is the balancing test – asserted through a newsperson's claim of qualified constitutional privilege – that serves to protect the public's First Amendment right to be informed.

No where is the need for a balancing test more apparent than when the government issues a subpoena that compels "**any and all . . . originals and copies**" of four years of a journalist's investigative research, as is the case here. The Court of Appeals erred by affirming a test that condones a subpoena that allows the government to seize far more information than is necessary for the grand jury to execute its investigatory function. Limiting a reporter's First Amendment protections to that of "intentional government harassment" does not prevent the government from confiscating *all* copies of Ms. Leggett's journalistic

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[15] Ms. Leggett continues to also assert that the subpoena should have been quashed under Fed. R. Crim. P. 17(c).

interviews, without any justification, and thereby effectively preventing Ms. Leggett from writing her book and substantiating her accounts to a publisher.[16] What the Fifth Circuit's test fails to protect against is the government's unfettered power to implement a "prior restraint" on Ms. Leggett's ability to publish which consequently restricts the public's right to know.

This Court in *Branzburg* specifically did not address the issue of "prior restraint" and the *Branzburg* majority found it important to point out that the cases under its consideration did not involve that as an element:

> But these cases involve no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.

408 U.S. at 681. Yet this issue is arguably one of the most important components of the First Amendment analysis when dealing with news gatherers. This Court has stated that preventing prior restraint of the press "was a leading purpose in the adoption of the constitutional provision." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451-452 (1938).

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[16] The government's earlier attempt to control the dissemination of her book by contract failed when Ms. Leggett rejected the confidential informant contract. Seizing, by grand jury subpoena, all of her interviews, both originals and copies, would of course delay the writing of her book. And surely, her incarceration for resisting the subpoena has stopped the book from being disseminated to the public altogether, "[a]n inmate currently confined in an institution may not be employed or act as a reporter or publish under byline." Department of Justice – Federal Bureau of Prisons, P.S.1480.05 § 540.60(3)(d).

By virtue of taking away a journalist's records, the government may make it impossible for a journalist to function, as is the situation in the present case. Yet, under *Smith* and the test approved in this case, a journalist has no recourse against such an action in a criminal setting.

Here, the Court of Appeals upheld the validity of the subpoena, finding that the record does not indicate that Ms. Leggett has been harassed, that the materials requested were related to the subject matter of the grand jury and:

> "While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive" (Slip opin., p. 7).

The Court never addresses the issue of prior restraint because it does not fit into its narrow analysis under the First Amendment and Federal Rule of Criminal Procedure 17(c). Surely Ms. Leggett's "right to publish without prior governmental approval" is a given and therefore, should have been part of a proper balancing analysis by the district court. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Indeed, this Court in *Branzburg, supra* at 709, expressly stated that it did not want to convert the press into an investigative arm of the government, which is exactly what Ms. Leggett would become if the government, and not Ms. Leggett or a publisher, is given exclusive possession and control of Ms. Leggett's work product. Ironically, it was only after Ms. Leggett refused

to become a confidential informant for the government, due in part to the government's requested restriction on the dissemination and publication of her materials, that she faced the total loss of her entire research through the government's subpoena power. There is no reason why Ms. Leggett should have been denied copies of her own work. At the very least, a proper balancing test would have prevented complete confiscation. Since this Court did not have occasion in *Branzburg* to deal with a subpoena which had a "prior restraint" effect, let alone one with an effect amounting to confiscation, it is important that this Court grant the writ of certiorari and consider this aspect of the issue.

Finally, only a balancing test, without a threshold requirement that "intentional harassment" or "oppression" be shown, adequately protects the public interest. A newsperson's claim of qualified constitutional privilege ultimately serves to protect the public's First Amendment right to be informed by an independent press. Conducting such a "case by case" review would not burden the system because as this court recognized in *Branzburg*, "the bulk of disagreements and controversies between press and federal officials" will be handled internally by the U.S. Attorney General through the Department of Justice's own regulations regarding subpoenas to the press. 408 U.S. at 7070; *see* 28 C.F.R. § 50.10.[17] However it

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[17] The regulations mandate federal prosecutors to seek the express approval of the U.S. Attorney General prior to subpoenaing a journalist's information and in doing so, following a specific series guidelines that will allow them to "strike the proper balance" between the public's right to know and the public's interest in effective law enforcement when

is in those extreme cases, such as here, where the Government has failed to conduct an internal balancing test or where the subpoena has resulted in an improper prior restraint that the balancing of interests is most necessary. Under the Fifth Circuit's limited test of "intentional harassment" or oppression, these issues cannot be addressed or evaluated. For the foregoing reasons, this Court is urged to accept review of Ms. Leggett's case and provide clarification as to the proper test to be applied to a news gatherer's First Amendment qualified privilege.

II.

Was the Court of Appeals determination that the contemnor had not made an adequate showing to invoke her Fifth Amendment privilege in conflict with the relevant decisions of this Court?

Under the Fifth Amendment, a witness may resist not only testimony but also the production of personal documents that may be incriminating. That privilege has long been construed as applying within the grand jury room. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. Mandujano*, 425 U.S. 564, 570-573 (1976). As further explained in *Mandujano*, immunity grants play an important role in determining the applicability of the Fifth Amendment to grand jury witnesses. Ms. Leggett

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compelling a journalist's information. 28 C.F.R. § 50.10. Indeed, this Court in *Branzburg, supra* at 707, noted the importance of the Department of Justice's internal review and many of the circuit courts have used this factor as part of their balancing tests. No such analysis was done in this case because the interests were not balanced by the lower courts.

asserted her Fifth Amendment privilege before the grand jury based on a reasonable fear of self-incrimination, or in other words, a good faith basis, thereby requiring the government to secure immunity under 18 U.S.C. §§ 6001, *et seq.*

The Fifth Amendment protects against production of tapes or notes, when the act of production is testimonial. *Fisher v. United States*, 425 U.S. 391, 408 (1976) As the Fifth Circuit itself recognized:

> [T]he testimonial component involved with order for production of documents "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. . . . A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness. There would then be testimonial compulsion.

In re Grand Jury Subpoena (Kent), 646 F.2d 963, 968 (5th Cir. 1981). *See also United States v. Doe*, 465 U.S. 605, 612-13 (1984) (the act of production of papers which are covered by the Fifth Amendment establishes that the papers exist, are in the witness' possession or control, and are authentic.)

The Court of Appeals made short work of Ms. Leggett's Fifth Amendment claim, first observing that Ms. Leggett was "repeatedly advised that she is neither a target nor a subject of the grand jury investigation." Slip opin., p. 8. The Court of Appeals went on to hold that Ms. Leggett had not met the requirement of "reasonable cause to apprehend danger from a direct answer" to questions

and had not shown that her answers might "furnish a link in the chain of evidence needed for a prosecution," citing *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986). Finally, the Court of Appeals accepted the government's proffer of a non-prosecution agreement as an adequate alternative safeguard. The problems with the Court's ruling regarding Ms. Leggett's claim of Fifth Amendment privilege will be discussed in turn below.

First, the Court of Appeals analysis failed to recognize that a witness need not confess guilt to any crime, or even be guilty of any crime, to properly invoke the Fifth Amendment. *Ohio v. Reiner*, 532 U.S. 17, 121 S.Ct. 1252 (2001). The privilege is not limited to those who may be the "target" or the "subject" of a grand jury investigation. As this Court recently reaffirmed:

> One of the Fifth Amendment's basic functions . . . is to protect innocent men . . . "who otherwise might be ensnared by ambiguous circumstances." *Grunewald v. United States*, 353 U.S. 391 (1957).

Reiner, supra, at 1254.

The Court of Appeals decision also did not recognize that Ms. Leggett had made a sufficient showing that she had "reasonable cause" to apprehend danger of prosecution and that her assertion of the Fifth Amendment privilege was well justified. Here, the Government's subpoena requested all taped interviews conducted by Ms. Leggett "either with or without consent". Ms. Leggett testified at the Motion to Quash hearing that in the course of her research (conducted throughout the United States), she had taped interviews that fit both categories (Tran. I-28

and 34). The government recognized this was potentially illegal activity in about "five or six" states (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may also be a violation of federal law under 18 U.S.C. § 2512. Ms. Leggett provided more than enough information to assert that she had "reasonable cause" to believe that she was in danger of prosecution. However by asserting her Fifth Amendment privilege, she refused to provide the "missing link" that could lead to an indictment.

Finally, the Court of Appeals erred by accepting the government's inadequate offer of immunity as the equivalent of the Fifth Amendment's protection. It upheld the District Court's erroneous conclusion that the prosecutor's offer of a unilateral letter of "immunity" was equivalent to Section 6001, *et seq.* Immunity can be granted only (1) by following the requirements of Section 6001 *et seq.* or (2) by a mutually agreed letter or contract between the government and the witness, and not by a rejected offer of an "immunity letter." The validity of a letter agreement is determined by contract law – arms length bargaining, a meeting of the minds on the essential terms of the agreement and acceptance without coercion. Here the government said either you agree to the terms of the letter or we will ask the court to jail you for criminal contempt.

An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the federal prosecutor, and this, cannot be contractually

bound by the federal prosecutor's agreements.[18] This distinction is especially important in this case where the government recognized that Ms. Leggett may need additional state immunity for nonconsensual recordings of conversations outside the state of Texas. Yet, the government refused to seek statutory or state prosecution immunity, unless Ms. Leggett gave incriminating details supporting her asserted privilege. Ms. Leggett was not properly immunized and for this reason alone, this court should grant further review of this case and vacate Ms. Leggett's finding of contempt.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari as to the questions presented in order to mandate uniform application of the qualified privilege of journalist's under the First Amendment and to order recognition of petitioner's absolute Fifth Amendment privilege.

Respectfully submitted,

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[18] Similarly, it was doubtful that the informal immunity letter would be binding on a federal prosecutor outside the jurisdiction of the Southern District of Texas upon review for possible prosecution under 18 U.S.C. § 2512.

APPENDIX

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2. District Court's Contempt Order, July 20, 2001.....App. 10
3. Order Denying En Banc Consideration, November 13, 2001 .....App. 11

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

IN RE: GRAND JURY SUBPOENAS

**Appeal from the United States District Court
for the Southern District of Texas
(H-01-MC-179)**

(Filed Aug. 17, 2001)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges,

PER CURIAM:*[1]

Vanessa Leggett appeals the district court's order finding her in contempt of court for refusing to comply with a grand jury subpoena. *See* 28 U.S.C. § 1826(a). Citing her "journalist's privilege"[2] under the First Amendment Leggett refused to provide the grand jury with certain audio tapes and notes. Because this circuit has held that the journalist's privilege is both limited and qualified, and is especially hedged about in grand jury

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

[2] This constitutional protection is also frequently referred to as the "news reporter's privilege."

proceedings, we now affirm the district court's order finding Leggett in contempt.

A federal grand jury for the Southern District of Texas is currently conducting an investigation into possible illegal activities of Robert Angleton. Angleton, a wealthy Houstonian, is under investigation for, inter alia, a murder-for-hire scheme in which he allegedly agreed to pay his brother, Roger Angleton, to kill his wife, Doris Angleton. Robert Angleton was previously tried and acquitted in state court for his role in the 1997 murder. The federal grand jury was convened after the acquittal. Roger Angleton, the alleged triggerman, committed suicide while in custody at the Harris County jail. This notorious "society murder" and the bizarre events surrounding it have garnered a great deal of attention in Houston and throughout Texas.

Vanessa Leggett is an English teacher and aspiring freelance writer[3] who became intrigued by the Angleton case from its inception. In order to write a book about the murder, she began an extensive independent investigation that led to interviews with both Angleton brothers, Roger's wife Jennifer Manning, and numerous other people connected to the case. The interviews were recorded on tapes and in written notes.

Because of her knowledge of the case, Leggett was subpoenaed to appear before the federal grand jury on

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[3] Leggett's body of published work consists of a single article in an FBI publication, *Varieties of Homicide*, and one fictional short story. To date, Leggett has published nothing on the Angleton murder.

December 7, 2000. She was advised of the nature of the grand jury's investigation and was assured that she was neither a target nor a subject of the grand jury proceedings. Leggett testified before the grand jury without protest and answered all of the questions posed to her. She did not object at that time to turning over to the grand jury all notes or tapes or photographs that would help them.

After the grand jury appearance, Leggett resumed her independent investigation. On June 18, 2001, she received another subpoena directing her to appear before the grand jury, and to bring with her

> Any and all tape recorded conversations, originals and copies, of conversations you had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.

In response, Leggett hired an attorney and moved to quash the subpoena, invoking the journalist's privilege under the First Amendment. Following a hearing on July 6, the district court denied Leggett's motion in a written order. While her pro se motion to reconsider remained pending, she was served on July 18 with a new but virtually identical grand jury subpoena compelling her to appear on July 19. That night Leggett retained her current counsel.

Leggett went before the grand jury, but, armed with claims of First and Fifth Amendment privilege, she refused to produce the tape recordings and notes. The

United States countered her invocation of the privilege against self-incrimination with a "proffer letter" granting use and derivative-use immunity for any testimony given before the grand jury or in statements made to federal agents. Leggett refused to accept this offer.

The government obtained an immediate hearing before the district court to address Leggett's non-compliance. The district court held her in civil contempt pursuant to 28 U.S.C. § 1826(a) and ordered her jailed. The statute authorizes incarceration until Leggett furnishes the materials called for by the subpoena or, if she does not, until the term of the grand jury expires, up to a maximum of 18 months. This expedited appeal followed.

A district court's order holding a recalcitrant witness in contempt under 28 U.S.C. § 1826(a) is reviewed for abuse of discretion. *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 n.1 (5th Cir. 1991); *In re Grand Jury Proceedings (Mallory)*, 797 F.2d 906, 907 (10th Cir. 1986). Similarly, an order denying a motion to quash a subpoena is reviewed for abuse of discretion. *See In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997).

Generally applicable laws, including the obligation to answer a grand jury subpoena, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* Further, the Supreme Court has admonished that evidentiary privileges – including by logical extension the journalist's privilege – are generally disfavored in the law. *See Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635 (1979).

Nevertheless, a qualified privilege protects journalists from divulging confidential sources under limited circumstances. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972); *Miller v. Transamerica Press*, 621 F.2d 721, 726 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). The strength of this journalist's privilege is at its apex in the context of civil cases where the disclosure of confidential sources is at issue. *See Miller*, 621 F.2d at 726; *Selcraig*, 705 F.2d at 789. However, the privilege is far weaker in criminal cases, reaching its nadir in grand jury proceedings: "[n]either does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg*, 408 U.S. 665).

Even assuming that Leggett, a virtually unpublished freelance writer operating without an employer or a contract for publication, qualifies as a journalist under the law,[4] the journalist's privilege is ineffectual against a

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[4] Because the First Amendment news reporter's privilege is inapplicable in this case whether or not Leggett is a journalist, we do not reach this issue. While this circuit has yet to consider who qualifies as a journalist for the purpose of asserting privilege, our inquiry into this question would be guided by the three part test used in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public. *See In re Madden*, 151 F.3d 125, 128 (3rd Cir. 1998). *See also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2nd Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Thus the

grand jury subpoena absent evidence of governmental harassment or oppression. As this court has explicitly held, "[s]hort of such [governmental] harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). This court takes a narrow view of the journalist's privilege in criminal cases, particularly in grand jury proceedings. *Smith*, 135 F.3d at 969. Only when the "grand jury investigation is not being conducted in good faith" is the journalist's privilege valid. *Id.* (citing *Branzburg*, 408 U.S. at 710).

In the present case, Leggett has not demonstrated that the district court abused its discretion by finding that the Angleton grand jury investigation is proceeding in good faith. The record does not indicate that Leggett has been harassed or oppressed by these grand jury proceedings. While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive. Indeed, the subpoena clearly seeks material that is closely related to the subject of the grand jury investigation. *See United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722 (1991) (motion to quash grand jury subpoena may not be granted unless the movant demonstrates no reasonable possibility that the materials sought will produce information relevant to the general

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journalist's privilege is available to persons "whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Madden*, 151 F.3d at 129-30. The party claiming the privilege has the burden to establish his or her right to protection. *Id.*; *von Bulow*, 811 F.2d at 144. The district court made no factual finding on Leggett's status as a journalist.

subject of the grand jury's investigation). Contrary to Leggett's insinuations, the record does not reflect that the grand jury is acting with any sort of malice toward her. Leggett's efforts to invoke the qualified journalist's privilege with conclusory assertions fail.

Leggett's reliance on this court's decisions in *Miller*, 621 F.2d at 726, and *Selcraig*, 705 F.2d at 789, is also misguided. Both cases deal with the journalist's privilege in civil libel suits. Their test that balances the civil litigants' need for disclosure against the journalist's legitimate desire to protect confidential sources is entirely inapplicable in criminal cases in this court.[5] In contrast, the Supreme Court has emphasized that in criminal cases – especially grand jury proceedings – the public's interest in effective law enforcement virtually always outweighs the press's privilege against disclosing confidential sources or information. *See Branzburg*, 408 U.S. at 690; *Smith*, 135 F.3d at 972. Further, no circuit court has recognized a qualified testimonial privilege in the context of a criminal grand jury, and other courts have drawn a distinction between grand jury and non-grand jury cases. *See, e.g., In re: Grand Jury Proceedings*, 5 F.3d 397, 402 (9th Cir. 1993) (noting that the court had earlier established a qualified privilege in a non-grand jury context "only because that case – unlike *Branzburg* or the present case – did not involve testimony before a grand jury.").

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[5] In a *civil* case in which the journalist's privilege is invoked, the party seeking to obtain the confidential information must show that: (1) the information is relevant; (2) it cannot be obtained by another means; and (3) there is a compelling interest in the information. *See Miller*, 621 F.2d at 726.

Equally unavailing is Leggett's attempt to invoke the Fifth Amendment privilege against self-incrimination. She has been repeatedly advised that she is neither a target nor a subject of the grand jury investigation. She has made no meaningful argument that the disclosure of her tape recordings and interview notes could be used against her in some future criminal prosecution. Leggett's vague and speculative effort to invoke the Fifth Amendment is further undermined by the government's proffer of a written non-prosecution agreement.[6] Because Leggett has not shown any "reasonable cause to apprehend danger from a direct answer," and because her answers would not "furnish a link in the chain of evidence needed for a prosecution" of her, she cannot properly invoke the Fifth Amendment's privilege against self-incrimination. *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986).

For the foregoing reasons, the district court did not abuse its discretion in ordering Leggett incarcerated for

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[6] The written non-prosecution agreement read as follows:

> Any information you provide in response to questions posed by law enforcement agents or a subsequent grand jury shall receive protections coextensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of 18 U.S.C. § 6001 et seq. That is, such information shall not be used directly or indirectly against you in any criminal case, except that such information may be used against you in any prosecution for perjury, giving a false statement to a federal official in a matter within the official's jurisdiction, and/or obstruction of justice.

contempt under 28 U.S.C. § 1826(a). We therefore AFFIRM its judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MISCELLANEOUS NO. 01-179

JUDGMENT AND COMMITMENT FOR CONTEMPT

(Filed July 20, 2001)

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Nov. 12, 2001)

O R D E R:

IT IS ORDERED that sealed appellant's motion for leave to file out of time motion for reconsideration of this Court's order of September 18, 2001, denying bond pending petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the motion for leave to file brief of amicus in support of sealed appellant's motion for reconsideration is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Nov. 13, 2001)

(Opinion 08/17/01, 5. Cir., ___, ___ F.3d ___)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service

not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge
REHG-5a